NO. 22229

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BILL HARVEY DUKES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

STATEMENT OF PROCEEDINGS AND JURISDICTION

The files and records in the appellant's original criminal trial, United States v. Frank Harvey Dukes, Southern District of California, Central Division, No. 34393-CD show that: on January 11, 1965, at his arraignment, a lawyer was appointed to represent the appellant. On January 25, 1965, the appellant proceeded to trial with his attorney; on January 27, 1965, he was convicted by a jury, and sentenced by the court to 25 years; on February 4, 1965, the appellant, in pro per, filed a motion for leave to appeal in forma pauperis, which was denied on that date

by the court as frivolous and not taken in good faith; on or about March 10, 1965, appellant's court-appointed attorney filed a motion, executed by appellant, pursuant to Rule 35, for a reduction of sentence; on March 22, 1965, that motion was argued by counsel before the court and denied; on February 24, 1966, appellant herein filed a petition in the District Court, addressed to the Ninth Circuit Court of Appeals requesting leave to appeal in forma pauperis (Frank Harvey Dukes v. United States of America, Ninth Circuit Misc. 2696); on November 3, 1966, the motion was denied; on December 8, 1966, a motion for a rehearing en banc was denied; thereafter petitioner moved the United States Supreme Court for a writ of certiorari, and that motion was denied, as was a motion for a rehearing. 386 U.S. 946, 988 (1967).

The files and records in United States v. Frank Harvey Dukes, Southern District of California, Central Division, No. 34393-CD, Criminal, show that no notice of appeal was ever filed, and that no request for an attorney to prosecute to the Ninth Circuit either an appeal or a petition for leave to appeal in forma pauperis was filed.

A. APPELLANT'S CLAIMS OF ERROR

The claimed errors presented in appellant's "Brief in Behalf of Appellant" (herein abbreviated as "B") are different from the claimed errors presented to the District Court in appellant's "Motion, pursuant to Sec. 2255 of Title 28, United States Code By

a Person in Federal Custody" (herein abbreviated as "M"). For this reason, as well as for convenience and clarity, a summary of the claims presented in each pleading seems useful.

1. CLAIMS PRESENTED IN THE §2255 MOTION

The motion states as grounds:

"(a) Denied the protection of the 1st, 5th, 6th, 8th, 14th Amendments of the United States Constitution.

"(b) Denial of the protection of the 'Rules of Federal Criminal Procedure' in Rules 3, 5, 7, 8, 10, 11, 12, 26, 30, 31, 32, 33, 35, 38, 44, 46, 52, 53, 60B." [M. 3]

The facts allegedly supporting these grounds are:

"Ineffective counsel (not incompetent) caused petitioner's above mentioned constitutional rights to be violated by being forced by the court to accept this petitioner's case (see Exhibits Nos. 4-9, Lines 1-25), and not pursuing appeal to the 9th Circuit Court of Appeals without payment. Also not having counsel prior to the time of plea, bias of judge.

"Denial of 'Rules of Federal Criminal Procedure' because of the trial judge's flippant aditude of court room procedures & resulting from

bias to the petitioner from the bail hearing's reading of the records that prove to be false. (see Exhibits 'A' and '10')." [M. 3]

The motion also contains two portions which are incorporated as part of the statement of grounds and facts. The "Argument and Facts" (hereinafter abbreviated as "A") is a brief. The second portion consists of thirteen exhibits, designated A, B, C and 1-10. (The exhibits are referred to as designated in the motion).

The entire motion asserts these grounds for Section 2255 relief:

The denial of counsel at the hearing on bail reduction and arraignment and plea [M. 3, A. 7, 10];

The court forced the appellant's appointed counsel to accept the case, and forced the appellant to accept the counsel appointed [M. 3, A. 7];

The trial court, who had presided at the bail reduction hearing, was biased thereafter against the petitioner because, at the bail reduction hearing, an FBI record was read stating that petitioner was an escapee from the New Jersey State Prison, while, in fact, the petitioner was an escapee from a county jail [M. 3, A. 7];

Lack of meaningful representation by counsel at the trial and at the sentencing, because counsel did not consult with the appellant before trial and was not informed about the appellant's

record nor about the considerations which the court was using in imposing sentence [M. 3, A. 5, 7, 10].

Sentencing appellant immediately after conviction without a pre-sentence investigation [A. 6];

The use at sentencing of an FBI record concerning appellant which record contained allegedly erroneous information [M. 3, A. 4, 8, 10];

The interruption at sentencing by the trial judge of a comment or inquiry by appellant's attorney [A. 4];

The "flippant attitud", of the trial judge which caused the appellant to refrain from interrupting the reading of the FBI record when further errors were read [M. 3, A. 4, 10];

The disparity between the sentence given appellant and that given by another judge to appellant's accomplice [A. 9];

Bias of the trial court against those who plead not guilty [M. 3, A. 8, 9];

An ineffective court appointed counsel who did not appeal without payment to the Ninth Circuit Court of Appeals [M. 3].

Appellant's motion also requested the appointment of an attorney to represent him on his motion, and his motion was accompanied by an Affidavit of Bias, pursuant to 28 U.S.C. §144 [A. 10].

2. CLAIMS STATED IN THE "BRIEF ON BEHALF OF APPELLANT"

The claims of error presented in the brief are more numerous than those presented in the motion. The following errors are alleged to have been made at all stages of the proceedings:

At the arraignment, Judge Carr manifested a personal bias against the appellant [B. 11-12];

The prosecution and Judge Carr maneuvered to have the trial of the case transferred from Judge Curtis' trial calendar to Judge Carr's trial calendar [B. 12];

Misidentification of the appellant at the trial [B. 31];

Misstatements by the appellant's accomplice regarding the name and date of the bank robbed [B. 31];

Giving erroneous jury instructions [B. 31];

Improper comment by the court on the evidence [B. 31];

Sentencing the petitioner to the maximum term of twenty-five years [B. 3, 4];

Imposing sentence immediately following the jury verdict without obtaining a presentence report [B. 11, 13];

Using erroneous data in the FBI record as a basis for the sentence [B. 4, 8-10, 15, 35];

The District Court failed to discuss the FBI record with the defendant [B. 10, 11];

Receiving ineffective representation at the sentencing because his counsel did not challenge the erroneous data, told the defendant to answer the court's questions, and revealed a

conversation with the defendant [B. 4, 15-19];

District Court action denying him leave to appeal in "forma pauperis" [B. 2, 5, 13, 24, 25, 28, 33, 35];

Using incarceration procedures which prevented him from perfecting and protecting his appeal [B. 26];

Not receiving counsel to assist him in perfecting his appeal from the trial verdict [B. 5, 25, 33, 35];

The denial by this Court of Appeals as "untimely" of his petition for leave to appeal, and of his petition for rehearing thereon [B. 2];

The denial, by the United States Supreme Court of his petition for certiorari and of his petition for rehearing thereon [B. 2];

The denial of his affidavit disqualifying the sentencing judge from hearing the §2255 motion [B. 1, 4-8, 11-15, 34-35];

The denial of counsel to assist him with his §2255 motion [B. 35];

The denial of his right to be present at the hearing on his motion [B. 35];

The denial without a hearing of his §2255 motion [B. 3, 33, 34];

Overruling his §2255 motion because each of these defects required the granting of the motion;

Receiving an unconstitutionality imposed maximum sentence [B. 3, 4, 10, 11];

Using an erroneous FBI report in sentencing [B. 3, 4,

8-10, 13, 15, 35];

Having ineffective counsel at the sentencing [B. 3, 4, 11-18];

Receiving a twenty-five year sentence while his accomplice received only a six year sentence [B. 18];

Denying his motion to appeal his conviction in forma pauperis [B. 5, 13, 24, 31, 35];

Preventing him from perfecting his appeal [B. 36]; and

Not receiving the assistance of counsel in his efforts to perfect an appeal from his conviction [B. 5, 25, 35].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a)(d) and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

ARGUMENT

A. APPELLANT'S AFFIDAVIT OF BIAS WAS LEGALLY INSUFFICIENT.

The court against whom the affidavit of bias was filed was correct in refusing to transfer the matter to another judge. The affidavit is legally insufficient.

The affidavit claims that the Honorable Charles H. Carr

is biased against the appellant for three reasons:

Misreadings of FBI records at a bail reduction hearing;

Further misreading of an FBI record at the time of sentencing; and

The court's remarks about motions for relief under 28 U.S.C. §2255.

28 U.S.C. §144 requires a factual showing that:

> ". . . the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party. . . ."

Appellant's affidavit is insufficient, and even the most generous interpretation will not correct the deficiencies. The authorities cited in appellant's brief, at pages 14 and 15, do not support the appellant's position. Hogdon v. United States, 365 F.2d 679 (8th Cir. 1966), and Haliday v. United States, 380 F.2d 270, 272, 274 (1st Cir. 1967) support the court's ruling. The affidavit lacks any facts showing any personal bias by the court.

In Berger v. United States, 255 U.S. 22, 36 (1921), the court held that the judge against whom the affidavit is directed may rule on the sufficiency of the affidavit. The court reaffirmed an earlier decision in Ex parte American Steel Barrel Company, 230 U.S. 35:

"That the bias or prejudice which can be urged against the judge must be based upon something other than the rulings in the case." (at p. 31)

The matters referred to in the petitioner's affidavit arise from the judicial consideration of this case.

In Connelly v. United States District Court, 191 F. 2d 692 (9th Cir. 1951), and Gladstein v. McLaughlin, 230 F. 2d 762 (9th Cir. 1955), this Court sustained as sufficient affidavits of prejudice. Those affidavits clearly related to prejudice of extra-judicial origin. In Lyons v. United States, 325 F. 2d 370 (9th Cir. 1963), this Court said:

"For disqualification of a judge under 28 U. S. C. §144, a sufficient showing by affidavit of personal bias or prejudice is required (citations omitted). The section is directed to personal bias, which means an attitude of extra-judicial origin. A mere showing of prior judicial exposure to the present party to the question will not invoke the section. . . ." (at page 376)

In Cole v. Lowe's Inc., 76 F. Supp. 872 (S. D. Cal. 1948), in a lucid and thorough discussion, Judge Yankwich summarized the law:

"The mere filing of an affidavit does not oust the judge from the cause.

"The judge has the right to determine the legal sufficiency of the affidavit.

"The bias or prejudice must be personal, i. e., antagonism or opposition to the litigant or favoritism for his opponent.

"Definite views on the law, adverse rulings in the case on trial, or adverse rulings against the suitor in other cases or in cases involving similar facts do not constitute such disqualification, even in a criminal prosecution." (at pages 876, 877).

Appellant's affidavit does not meet the standard of personal, extrajudicial bias. The incidents of bias all occurred during various stages of the proceedings which led to the appellant's conviction and sentence. In two of the cases, the appellant objects to sources to which the court referred for information; in the third, the appellant attempts to convert a statement of caution by the court into a statement of personal hostility.

B. THE LOWER COURT DID NOT ABUSE ITS DISCRETION BY NOT APPOINTING AN ATTORNEY AND BY NOT ORDERING APPELLANT'S PRESENCE.

Appellant's claims of major procedural errors in connection with the denial of this §2255 motion are without merit. He had neither an absolute right to counsel nor to a hearing at which he

was in attendance.

The lower court found and held that: " . . . the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief . . ." and denied the motion without a hearing. 28 U.S.C. §2255, Order denying motion, etc., dated August 2, 1967. Even if there had been a hearing, the statute clearly indicates that the prisoner is not absolutely entitled to attend. "A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." 28 U.S.C. §2255. This motion was entertained and decided on the record, files and motion papers as authorized by §2255.

Nor was appellant absolutely entitled to an appointed attorney to assist him in the presentation of his motion in the lower court. The question whether to appoint an attorney for appellant in connection with his §2255 motion, is addressed to the sound discretion of the trial court.

Dillon v. United States, 307 F.2d 445, 447
(9th Cir. 1962);

Vinson v. United States, 235 F.2d 120
(6th Cir. 1956).

In Dillon v. United States, supra, the court held that even when a hearing is held, the court has discretion regarding appointment of counsel. It must decide whether or not a fair and meaningful §2255 hearing cannot be held without the aid of counsel. In this case, considering the forms provided by this Court to the

appellant, his demonstrated ability to express himself, and the absence of any need for a hearing, it clearly cannot be said that an attorney was required for a fair and meaningful motion.

C. MANY CLAIMS RAISED BY APPELLANT'S MOTION WERE PROPERLY DISMISSED BY THE DISTRICT COURT AS UNSUPPORTED.

Many claims made by appellant in his §2255 motion were properly dismissed by the court because the appellant did not allege any supporting facts and none appeared through judicial notice or in the record. The duty of alleging and proving sufficient facts to support his right to relief was the appellant's and mere conclusory allegations in the motion are not enough.

Ingling v. United States, 303 F. 2d 302 (9th Cir. 1962);

Navedo Santos v. United States, 305 F. 2d 372 (1st Cir. 1962).

Nothing in the motion, the argument and facts, and the exhibits, relates or explains in any reasonable way the claims that he was denied the protection of the First, Eighth and Fourteenth Amendments of the United States Constitution. Nor is there anything in the motion which sustains his claim that he was denied the protection of any of the following Rules of Federal Criminal Procedure: 3, 5, 7, 8, 10, 11, 12, 26, 30, 31, 33, 38, 46, 52, 53, 60B [M. 3].

D. MANY ERRORS URGED ARE NOT PROPERLY BEFORE THIS COURT BECAUSE THEY WERE NOT RAISED IN THE LOWER COURT.

Appellant's brief attempts to have this Court decide many claims which were never presented in appellant's §2255 motion. We respectfully suggest those issues are not properly before this Court and should not be considered.

Geise v. United States, 262 F. 2d 151, 157 (9th Cir. 1958).

The first claim is that there was maneuvering by the prosecution and Judge Carr to have the trial transferred from Judge Curtis to Judge Carr [B. 12]. No supporting facts are alleged, nor is there any statement showing how appellant might have been prejudiced.

Hill v. United States, 368 U.S. 424, 428 (1962); Machibroda v. United States, 368 U.S. 487 (1962).

The next group, matters specified as errors the appellant wanted to appeal, were not asserted below: misidentification of the defendant, misstatements by the defendant's accomplice, erroneous jury instructions and improper comments by the court [B. 31]. Even if properly raised, these claims are without merit. These allegations are merely unsupported conclusions. Ingling v. United States, supra; Navedo Santos v. United States, supra. The §2255 motion is not an appeal substitute, and only deals with fundamental errors. Hill v. United States, 368 U.S. 424, 428 (1962);

Machibroda v. United States, 368 U.S. 487 (1962); Dodd v. United States, 321 F.2d 240, 243 (9th Cir. 1963).

Aspects of the claim of ineffective representation are first raised in this appeal. These are the lawyer's failure to challenge the allegedly false information presented to the court, his instruction to the defendant to answer the court's questions at the sentencing, and his revelation at the sentencing to the court of a communication with the defendant [B. 4, 15-19]. These claims, if true, and properly presented, are insufficient as a basis for §2255 relief. In order to justify a new trial or sentence hearing, the original proceeding must have been a farce because of ineffective representation.

Machibroda v. United States, supra;

Hill v. United States, supra;

Anderson v. United States, 338 F.2d 618 (9th Cir. 1964);

Dodd v. United States, supra.

The District Court's denial to the appellant of leave to appeal in forma pauperis from his conviction is also being raised here for the first time [B. 2, 5, 13, 24, 25, 28, 33, 35]. The records of this Court show that appellant never attempted to challenge, in this Court, the District Court's certification that appellant's appeal was without merit and not in good faith. This he was entitled to do. 28 U.S.C. §1915.

Ellis v. United States, 356 U.S. 674 (1958);

Johnson v. United States, 352 U.S. 565 (1957).

His belated request to proceed in this Court in forma pauperis was dismissed as untimely, and will be considered later in this brief.

His claim that intraprison incarceration procedures prevented him from perfecting and protecting his appeal was not raised below, and contradicts the record. The file in the appellant's criminal case shows that on March 15, 1965, defendant and his attorney served and filed a motion to modify defendant's sentence pursuant to Rule 35, Federal Rules of Criminal Procedure. It was argued March 22, 1965. Furthermore, an examination of the petition for leave to appeal in forma pauperis, filed in this Court in Dukes v. United States, Misc. No. 2696 (also filed in United States v. Dukes, So. Dist. No. 34353-CC) shows this claim is inaccurate. It contains a note to appellant from the McNeil Island authorities showing that he did have access to the McNeil Island Law Library facilities on March 1, 1965. One can only conclude that he had ample opportunity, in fact, to file an appeal, in person or through his attorney [B. 26].

Finally, appellant's claims of error by the United States Supreme Court's denial of certiorari [B. 2] can be considered only by the United States Supreme Court.

Cf. Williams v. United States, 307 F. 2d 366 (9th Cir. 1962).

E. APPELLANT RECEIVED EFFECTIVE LEGAL REPRESENTATION AT HIS TRIAL.

The legal representation received by the appellant at his trial provides no basis for relief under 28 U.S.C. §2255.

Appellant's first claim of error is that he did not receive appointed counsel until after the bail reduction hearing and arraignment at which he pleaded not guilty [M. 3, A. 7, 10]. Since appellant pleaded not guilty and had a jury trial, it is hard to see how he was prejudiced and what relief could be afforded to him.

His next claim is that his attorney was forced upon him. This seems to be the basis for his position that his rights under Rule 44, the Fifth Amendment and the Sixth Amendment were violated or abridged. A portion of the transcript dealing with the appointment of counsel appears in the petitioner's motion, Exhibits 6 through 9. Exhibit 8 contains the following quote by the appointed counsel:

> "I am ready to go forward in the case. I have consulted last week with my client and I think I have a pretty good idea of what the Government's case is."

Contradicting the claim that the attorney was forced upon him, the following dialogue appears at A. Exhibit 8:

> "THE COURT: Do you want this man for your lawyer?

"DEFENDANT DUKES: If he is not too overworked, can't take care of me.

"THE COURT: Do you want him, or don't you want him?

"DEFENDANT DUKES: Yes, I will take him.

"THE COURT: All right, you have got him."

Since the appellant had an attorney in the advance of trial, at his trial, at his sentencing, and at the motion pursuant to Rule 35, following the sentencing, it is clear that the appellant's claims are without merit. The trial court, ruling upon this claim, found that the appellant, at the earliest time, was advised that he had a right to an attorney and that an experienced attorney was appointed at the appellant's request. He found that appellant's assertion was not consistent with the record (Order Denying Motion, etc. p. 2). The trial court could properly resolve this issue by drawing on his own personal knowledge and recollection. Machibroda v. United States, 368 U.S. 487, 495 (1962). He may also judicially notice court records. Hood v. United States, 152 F.2d 431 (C.A. 8, 1946); Estep v. United States, 151 F. Supp. 668, aff'd 251 F.2d 579 (C.A. 5, 1958); Smith v. United States, 337 F.2d 49, 51-54, cert. denied 381 U.S. 916 (C.A. 4, 1964). He did both and his judgment is not clearly erroneous. Federal Rules of Civil Procedure, Rule 52(a). The further claim that his lawyer was ineffective at the sentencing is equally without merit on this appeal, as a result of the trial court's findings on the quality of the

representation provided to appellant. The claim of ineffective representation is not a basis for relief under §2255, even where the record shows, as it does not in this case, that the attorney made a substantial mistake.

Anderson v. United States, 338 F. 2d 618
(9th Cir. 1964);
Washington v. United States, 297 F. 2d 342
(9th Cir. 1961).

The record must show that the trial itself was a farce.

Dodd v. United States, 321 F. 2d 240
(9th Cir. 1963).

The claim of ineffective representation is the classic example of the error raised on a §2255 motion which the trial court may decide on the basis of judicial notice and its own recollection, without a hearing.

Wheatley v. United States, 198 F. 2d 325
(10th Cir. 1952);
Dario Sanchez v. United States, 256 F. 2d 73
(1st Cir. 1958);
Ellis v. United States, supra.

The other claim by the appellant is that he received ineffective representation because his attorney did not appeal to the Ninth Circuit Court of Appeals without payment. The trial court's determination of the general competency of the appellant's attorney and the representation provided, are determinative of this issue. Further, the trial court in denying the appellant's motion

for leave to appeal in forma pauperis, indicated its opinion regarding the lack of objective merit to the defendant's claims for appeal. In this matter, appellant, even though he filed the motion himself, was not prejudiced. The copy of the appellant's petition in the Ninth Circuit, dated February 24, 1966, requesting leave to appeal in forma pauperis, which appears in the District Court's files, contains a statement that the original petition for leave to file in forma pauperis, filed in the District Court, was prepared by his court-appointed counsel.

Failure to file a notice of appeal is not ordinarily a ground for relief under §2255.

Williams v. United States, 307 F. 2d 366 (9th Cir. 1962).

The court, by inquiry into the records before it, and reference to its own notes and recollection, could wholly and conclusively determine that the appellant's claims of errors at the trial are without merit.

Dario Sanchez v. United States, 256 F. 2d 73 (1st Cir. 1958);

Navedo Santos v. United States, 305 F. 2d 372 (1st Cir. 1962).

Before failure of counsel to file a notice of appeal becomes error susceptible of §2255 relief, appellant must show more than neglect, and, plain reversible error at the trial. Dodd v. United States, 321 F. 2d 240 (9th Cir. 1963). Here, the trial court itself found no such plain reversible error existed. And, the failure of

the appointed counsel to file a notice of appeal, where he is of the opinion that no basis exists for an appeal, is not error. Counsel's unwillingness to file the appellant's motion for leave to appeal in forma pauperis certainly permits and supports the inference he held in that opinion.

Lewis v. United States, 294 F. 2d 209 (C. A. D. C. 1961).

F. THE CLAIM THAT THE SENTENCE WAS INFLUENCED BY IMPROPER FACTORS IS WITHOUT MERIT.

The lower court did not err in denying appellant's claims that it had considered improper matters, when sentencing him to twenty-five years for armed bank robbery.

Appellant claims that the trial court was given improper information about his previous criminal record, which caused the court to be personally biased against him and to impose a more severe sentence than might otherwise be imposed [M. 3, A. 4, 8, 10, B. 4, 8-10, 15, 35]. The complete answer is that, absent gross abuse, the District Court's exercise of discretion regarding the length of sentence will not be disturbed.

United States v. Baysden, 326 F. 2d 629, 631 (4th Cir. 1964).

Here, the court says that the fundamental and almost exclusive element involved in determining the length of sentence was the facts of the offense and that "little thought was given to

the FBI report because it was read to the court in such a way, that it was, in part, unintelligible." (Order denying motion under §2255, pp. 2, 3). This is sufficient to sustain the original sentence and the lower court's holding.

Parness v. United States, 368 F.2d 327,
cert. denied 386 U.S. 1012 (C.A. 3, 1966);
Putt v. United States, 363 F.2d 369,
cert. denied 386 U.S. 962 (C.A. 5, 1966).

Appellant's contention that the trial court was biased against the appellant at the time of sentencing because of the same factors, on the authority of the cases of Parness v. United States, supra, and Putt v. United States, supra, is similarly without merit.

Appellant's claim that he was denied the protection of Rule 35, Federal Rules of Criminal Procedure, is clearly not meritorious. The files in this case show that such a motion was made by appellant's court appointed counsel, argued by him and denied by the court.

Appellant's contention that there is something fundamentally and jurisdictionally defective in his receiving a 25-year sentence, while his accomplice received a 6-year sentence, is without merit. The difference itself is no evidence of abuse of discretion and the appellant, in his motion, indicates no unreasonable basis for the disparity. The trial court, in its order denying motion under §2255, clearly indicates a reasonable basis for the sentence given to appellant, and did not sentence the accomplice.

Simpson v. United States, 342 F.2d 643

(C.A. 7, 1965).

Finally appellant claims that fundamental error was committed because no pre-sentence investigation was made before he was sentenced. Rule 32, Federal Rules of Criminal Procedure, permits such a procedure, at the discretion of the trial court. The trial court's procedure was undoubtedly proper, and does not provide a basis for relief under §2255.

Hill v. United States, 368 U.S. 424 (1962).

Errors associated with sentencing are generally not correctible on motions pursuant to §2255, because they can be corrected on motions based on Rule 35, Federal Rules of Criminal Procedure and on appeal.

Anderson v. United States, 338 F.2d 618

(C.A. 9, 1964).

G. THE NINTH CIRCUIT DID NOT ERR IN DENYING APPELLANT LEAVE TO APPEAL HIS CONVICTION IN FORMA PAUPERIS.

Appellant implies that error occurred when, on November 3, 1966, he was denied leave by this Court to appeal in forma pauperis from his conviction [B. 2, 27]. He was sentenced on January 27, 1965 and on March 22, 1965, his motion under Rule 35, Federal Rules of Criminal Procedure was denied. On February 28, 1966, he filed his motion with this Court.

Considering this excessive delay, it is clear that this Court did not err in denying the motion, which was made thirteen months after his judgment of conviction was entered, and about eleven months after his motion for a reduction of sentence was denied.

In re Frogona, 221 F. 2d 794 (9th Cir. 1955).

Further, appellant's right to appeal in forma pauperis may not properly be raised on this §2255 motion. He moved the District Court for leave to appeal in forma pauperis. After denial he then raised the point in this Court. After denial here, he petitioned for certiorari to the United States Supreme Court [B. 2, 27, 28]. His contentions have previously been considered and denied. He is reopening the question again.

28 U.S.C. §2255;

Warren v. United States, 311 F. 2d 673 (8th Cir. 1963).

H. NO MERIT EXISTS TO APPELLANT'S CLAIM THAT THIS COURT SHOULD HAVE APPOINTED COUNSEL FOR APPELLANT SO THAT HE COULD APPEAL IN FORMA PAUPERIS FROM HIS CONVICTION.

In his brief on appeal, appellant now claims that error occurred because counsel was not appointed to help him proceed with an appeal in forma pauperis [B. 5, 25, 33, 35]. The record shows that the appellant had appointed counsel in the District

Court through March 22, 1965, about two months following his conviction and sentencing. His counsel helped him prepare and file in the District Court a petition for leave to appeal in forma pauperis. No notice of appeal was filed.

About one year later, around February 24, 1966, appellant, appearing in pro per, filed a petition in this Court requesting leave to appeal in forma pauperis. The petition contained no request for counsel. It was properly denied without hearing by this Court as untimely. Ordinarily, an indigent appealing to the circuit court from a denial in the District Court of leave to appeal in forma pauperis, is entitled to counsel to challenge the certification by the District Court that the appeal is not taken in good faith.

Ellis v. United States, 356 U.S. 674 (1958);

Johnson v. United States, 352 U.S. 565 (1957).

However, this request to the appellate court, is not an appeal.

Coppedge v. United States, 369 U.S. 438, 445 Footnote 10 (1962).

And, where the appeal is frivolous, and this appears from the record before the appellate court, then counsel need not be appointed to aid the appellant.

Coppedge v. United States, supra;

But cf. Swenson v. Bosler, 386 U.S. 258 (1967).

Nor does counsel need to be appointed where appellant never asks that other counsel be appointed for him in connection with his application to this Court for leave to appeal in forma

pauperis.

Tucker v. United States, 308 F. 2d 798 (9th Cir. 1962).

Appellant had counsel in the District Court. He never appealed his conviction, nor did he ever ask this Court for counsel to assist him. When he finally filed in this Court, he was too late to be heard, and no counsel needed to be appointed.

CONCLUSION

For the reasons herein stated the District Court's denial of appellant's §2255 motion should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Theodore E. Orliss
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